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GENBAND Management Services Corporation

**UNITED STATES BANKRUPTCY COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

In re:  
**COEFFICIENT, LLC,**  
Alleged Debtor.

Case No.: 4:18-bk-41932  
Chapter 7

In re:  
**TELEFFICIENT, LLC; aka TELESWITCH  
FINANCE, LLC,**  
Alleged Debtor.

Case No.: 4:18-bk-41933  
Chapter 7

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
GENBAND'S REPLY TO  
SUPPLEMENTAL SUBMISSION OF  
ALLEGED DEBTORS IN SUPPORT OF  
ALLEGED DEBTORS' ALLOCATION OF  
ATTORNEYS' FEES AND TOTAL FEES  
SOUGHT**

Genband Management Services Corporation hereby files its Reply to the Supplemental Submission of Alleged Debtors' Allocation of Attorneys' Fees and Total Fees Sought and in support thereof states as follows:

1           **I.       This Court’s dismissal of GENBAND’s involuntary petitions under 305(a)(1) does**  
2           **not warrant an automatic grant to the Alleged Debtors of attorneys’ fees, fees on**  
3           **fees, and costs.**

4           As briefed in Sections I through III of GENBAND’s Memorandum of Points and  
5           Authorities in Support of GENBAND’s Response to Alleged Debtors’ Motion for Judgment  
6           Against GENBAND for Fees and Costs (Dkt. 47 “GENBAND’s Opposition”), the Alleged Debtors  
7           rely on a cherry-picked presentation of the law to support their request for full attorneys’ fees and  
8           costs, but because the Court dismissed the involuntary bankruptcies under section 305, rather than  
9           section 303, a fee award is far from a foregone conclusion. The weight of authority holds that  
10          section 303(i) attorneys’ fee awards are not available where an action has been dismissed pursuant  
11          to section 305. *See, e.g., Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 127 (D.Md.1995) (“It  
12          would be paradoxical for the bankruptcy court to refuse to exercise jurisdiction on the grounds that  
13          the parties’ interests are best served by the court’s non-involvement, yet then to entertain a suit for  
14          damages stemming from the same bankruptcy proceedings.”); *but see In re Macke Int’l Trade, Inc.*,  
15          370 B.R. 236, 259 (B.A.P. 9th Cir. 2007) (approving award of attorney’s fees under Section 303  
16          following dismissal of case under Section 305).<sup>1</sup>

17          This Court stated in its oral ruling that a) GENBAND’s involuntary petitions were not  
18          brought in bad faith,<sup>2</sup> b) under precedent, the Court has “extraordinary discretion with respect to  
19          the basis for an amount of fees,”<sup>3</sup> and c) that the Court was open to GENBAND’s argument in a  
20          response that fees are inappropriate due to the circumstances in this case.<sup>4</sup> GENBAND respectfully  
21          requests that this Court decline to award the Alleged Debtors full attorneys’ fees and costs.

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<sup>1</sup> At the March 27, 2019 hearing on the fee issue, counsel for the Alleged Debtors acknowledged  
26          that *In re Macke Int’l Trade, Inc.*, 370 B.R. 236, 252 (B.A.P. 9th Cir. 2007) is not binding on the  
27          bankruptcy court.

28          <sup>2</sup> Transcript of Court’s Ruling on Motion to Dismiss, November 2, 2018 (Hr’g. Tr.) at 27:16.

<sup>3</sup> Hr’g. Tr. at 27:19-22

<sup>4</sup> Hr’g. Tr. at 31:22-32:4.

1           **II. In no event should this Court award more than the \$54,429.93 Alleged Debtors’**  
2           **claim can be allocated to Section 305(a) fees.**

3           Courts disagreeing with the *Macke* decision suggest that there should be no attorneys’ fees  
4 or costs awarded under section 305(a)(1); should this Court disagree with that precedent and instead  
5 follow the majority in *Macke*, section 303(i) leaves whether fees are awarded, and in what amount,  
6 up to the Court’s discretion. *Macke*, 370 B.R. at 252.

7           As briefed in Section IV of GENBAND’s Opposition, if the Court allocates some attorneys’  
8 fees to the Alleged Debtors, it should limit recovery to fees related to the abstention argument in  
9 the Motion to Dismiss. The Supplemental Submission of Alleged Debtors in Support of Alleged  
10 Debtors’ Allocation of Attorneys’ Fees and Total Fees Sought (Dkt. 52 “Alleged Debtors’  
11 Supplement”) reveals that only \$54,429.93 of the Alleged Debtors’ original \$200,000-plus fee  
12 request can be attributed to work spent on Section 305(a). In the interest of judicial efficiency,  
13 GENBAND will not challenge the Alleged Debtors’ fee allocation; to the extent this Court decides  
14 to award fees, it should only award fees for the portion of the case which was actually ruled upon,  
15 limiting the possible fee award to \$54,429.93.<sup>5</sup>

16  
17           **III. The Court should not award any fees that the Alleged Debtors incurred in**  
18           **connection with the defense of its fee request.**

19           Finally, the Court should not award *any* fees that the Alleged Debtors incurred in connection  
20 with the defense of its fee request. The Supreme Court in *Baker Botts L.L.P. v. ASARCO LLC* held  
21 that fees incurred by professionals employed by the bankruptcy estate in defending fee applications  
22 are not compensable as a matter of law. 135 S. Ct. 2158, 2169, 192 L. Ed. 2d 208 (2015). Because  
23 American jurisprudence is guided by the “bedrock principle” that “[e]ach litigant pays his own  
24 attorney’s fees, win or lose, unless a statute or contract provides otherwise,” specific intention to  
25 vary from the American Rule is required before fee-shifting will be assessed. *Id.* at 2164-65. The  
26 Court noted only one bankruptcy statute that provides for fee shifting: 11 U.S.C. § 110(i)(1)(C).  
27 *Id.* at 2165-66. That statute expressly overrides the American Rule, making fees incurred “in

28           <sup>5</sup> GENBAND undertook a review of the transcript of the hearing on the motion to dismiss.  
Approximately 25% of the time at the hearing was spent on the section 305 issue.

1 moving for damages under this subsection” expressly compensable. *Id.* at 2166. As stated in  
2 *ASARCO*, “[h]ad Congress wished to shift the burdens of fee-defense litigation” under another  
3 statute, “it easily could have done so.” *Id.* This Court should follow the Supreme Court and  
4 Congress’s example and decline to interpret Section 303(i) as allowing recovery of fees incurred in  
5 defending the fee request.

6 If, however, the Court disagrees that *ASARCO* is applicable, it may still exercise its broad  
7 discretion to decline awarding any “fees on fees” under Section 303(i). The law is clear that to the  
8 extent “fees on fees” are ever compensable, they are only compensable when the original fee  
9 request is *successful*. See *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253, 130 S. Ct.  
10 2149, 2157, 176 L. Ed. 2d 998 (2010) (holding that where statute allowed fees to be granted  
11 according to the Court’s discretion and Congress did not express intent to abandon the American  
12 rule, “a fees claimant must show ‘some degree of success on the merits’ before a court may award  
13 attorney’s fees.”). If the Court awards fees only for the Section 305 work, then the original fee  
14 request is not fully “successful,” and therefore the court should not award “fees on unsuccessful  
15 fees.”

16 Furthermore, counsel for the Alleged Debtors at Pachulski Stang Ziehl & Jones LLP  
17 (“PSZJ”) appears to have more than doubled its fees due to unfounded assumptions regarding this  
18 Court’s fee award process.<sup>6</sup> In Kenneth Brown’s Declaration in Support of the Alleged Debtors’  
19 Supplement, Mr. Brown includes a footnote explaining that, while the Alleged Debtors’ Reply brief  
20 stated PSZJ would cap its March fees at \$5,000, “that statement was prior to (i) any indication that  
21 the Court would not award fees for work done in connection with seeking dismissal under section  
22 303(b); and (ii) in the hope of avoiding the necessity of submitting additional evidence of fees  
23 incurred and incurring the associated costs.” (Dkt. 52-1, pg. 2). The time that the Alleged Debtors’  
24 counsel spent correcting its time entries is simply not compensable and should not be shifted to  
25 GENBAND. See, e.g. *In re Schneider*, 06-50441-MM, 2007 WL 3095464, at \*7 (Bankr. N.D. Cal.  
26 Oct. 22, 2007) (“Where the time entries are incomplete or require editing in order to comply with  
27 the court’s standards, the editing services are a clerical function that are not compensable.”)

28 <sup>6</sup> See Page 5 of Dkt. 52-1 requesting more than \$10,000 for fees through March 31, 2019.

1 GENBAND should not have to bear the expense of PSZJ's failure to segregate fees for tasks, which  
2 is a common bankruptcy practice consistent with the United States Trustee guidelines. Although  
3 PSZJ may not be subject to the U.S. Trustee guidelines, PSZJ stated from the outset that it would  
4 be seeking fees, and therefore reasonably should have anticipated the need for task billing under  
5 the circumstances.

6 This Court should decline to award fees on fees, especially given its dismissal based on  
7 Section 305 grounds alone and PSZJ's questionable billing for the Motion for Judgment for  
8 Attorneys' Fees.

9 **IV. Conclusion**

10 GENBAND filed the involuntary bankruptcies as a remedy afforded by Congress with a  
11 good-faith belief that it was a proper remedy. This Court should hold that section 303(i) is  
12 inapplicable to dismissals of involuntary petitions under section 305(a)(1). Alternatively, the Court  
13 should determine, based on the totality of the circumstances, that no fees or costs are appropriate  
14 in this case. If the Court does award fees and costs, they should not exceed the \$54,429.93 in  
15 Section 305(a) attorneys' fees submitted by the Alleged Debtors. The Court should not award any  
16 fees that the Alleged Debtors incurred in connection with the defense of its fee request or allow  
17 recovery of fees due to counsel's failure to properly track time spent, which is not defensible under  
18 circumstances in which counsel knew from the outset that it would be seeking fees.

19  
20 Dated: April 17, 2019

**FINESTONE HAYES LLP**

21  
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